twenty-fifth day of September, 1940, and there has been no increase of rent subsequent to that date, to the extent set out in the third column of the First Schedule to this Ordinance in respect of the types of premises and the standard rents set out adjacent thereto in the first and second columns of the said Schedule;"

The First Schedule was amended with effect from 10th December, 1949, by the Control of Rent (Amendment) Ordinance of that year and after that date there is no doubt as to the position. The first column of the amended Schedule mentioned "premises used wholly or partly for purposes other than human habitation", the corresponding "standard rent" mentioned in the second column was "up to $150 per mensem" and the corresponding percentage in the third column was "25%". On that it is crystal clear that so far as the Ordinance is concerned the rent which it was not unlawful for the landlord here to receive, that is the maximum recoverable rent, was the standard rent, that is $40, increased by 25% making a total of $50.

Prior to the amendment of the First Schedule the position is at first sight not quite so clear. So far as it applies to the present case the original schedule provided that in the case of "premises used for human habitation" where the "standard rent" was above $35 and up to $50 a month the percentage increase should be 10% and that in the case of "premises used for purposes other than human habitation" where the standard rent was up to $150 the percentage increase should be 25%. The premises here were used both for human habitation and for purposes other than human habitation and the question therefore arises which is the appropriate percentage.

Considered in the light of the Ordinance as a whole the answer can easily be seen. Section 3 attached consequences of a highly penal nature to the receipt of rent declared to be unlawful and section 6 mitigated the rigour of section 3 by saying that in certain cases certain increases over the standard rent should not be unlawful. In other words, section 6 creates certain exceptions to the rule of section 3 that a rent in excess of the standard rent is unlawful and in the present case the landlord is entitled to say that as the premises were used for "purposes other than human habitation" the permitted increase was 25% which was the actual increase made and that therefore he had brought himself under one of these exceptions and so escaped the penal provisions of section 3.

It is true that if the premises were "used for human habitation" the percentage would only be 10%. There is, however, no conflict. The landlord may bring himself within one of two alternative sets of conditions, and there being nothing in terms to say which is to be preferred it must be held that section 6 being a permissive one the landlord does no wrong if he complies with the condition most favourable to the person to whom the section gives permission, that is himself. Such a view, moreover, is in accordance with the general scheme of the Ordinance which clearly is to relax to a limited extent the more rigorous provisions of the 1940 Enactment.

In the circumstances I would allow the appeal, set aside the judgment of the High Court and order that judgment be entered for the original plaintiff who should also have his costs here, in the High Court and in the Sessions Court.

Hill and **Barakbah JJ.A.** concurred.

Appeal allowed.

Solicitors:—*Sault, Keith Sellar & Co.; George & Khoo.*

LIEW MOOI & ANOR. v. DIL BAHADUR BURA & ORS.

[O.C.J. (Gill J.) March 18, 1963]
[K.L. — Civil Suit No. 358 of 1962]

Damages—Fatal Accident—Loss of expectation of life—Assessment of damages—Civil Law Ordinance, 1956, ss.7 and 8.

The deceased a timber lorry attendant of 34 years was killed in a road accident. His monthly income at the time of the accident was $150 although there was evidence that he was earning $220 two months earlier and $300 prior to that. The administratrix and co-administrator of the estate of the deceased now claimed damages for loss of expectation of life on behalf of the widow, the four children and the parents of the deceased and also for and on behalf of the estate of the deceased. The first two defendants were the drivers of the vehicles in question. They blamed each other for the accident. The third defendant was the agent or servant of the second defendant.

Held: (1) in the circumstances of this case the accident was caused solely by the negligence of the second defendant and that he alone was liable to pay damages;

(2) taking into consideration the usual factors including the normal expectation of an active working life for a man of 34, the hazards and vicissitudes of life, the accelerated payment of compensation in a lump sum and allowing a suitable reduction for the above factors, general damages under section 7 assessed at $15,750 and special damages at $500 for funeral expenses.

Case referred to:—

(1) *Heatley & Anor.* v. *Steel Co. of Wales Ltd.* [1953] 1 All E.R. 489.

ACTION FOR DAMAGES.

G. T. S. Sidhu for the plaintiffs.

M. Shankar for the 1st defendant.

Henry Cheah for the 2nd and 3rd defendants.

Cur. Adv. Vult.

Gill J.: This is one of those cases in which in answer to a claim for damages under the provisions of sections 7 and 8 of the Civil Law Ordinance, 1956 arising out of a motor accident as a result of which a person was fatally injured, the defendants as the drivers of the vehicles involved throw the blame on each other for the accident. The accident occurred on 8th September, 1961 at about 11.55 a.m. at the 90th mile, Kuantan/Kuala Lumpur Road between a military truck No. O8CL96 driven by the first defendant and a timber lorry No. BF 6380 driven by the second defendant, a servant or agent of the third defendant. The person fatally injured as a result of the accident was the timber lorry attendant named Chen Yoon Kwai, and the present action is brought by the administratrix and co-administrator of the estate of the said Chen Yoon Kwai deceased for the benefit and on behalf of the widow, the four children and the parents of the deceased and also for and on behalf of the estate of the deceased.

The story of the first defendant as to how the accident occurred is that he left Sungei Besi at about 7.30 a.m. on 8.9.61 in a military convoy and that he was driving a 3-tonner military truck O8CL96 which was the third vehicle in the convoy, the leader of the convoy being Sergeant Amar Singh Rai who was travelling in a Land Rover. The second vehicle in the convoy was also a 3-tonner driven by Sapper Sarke Ghali who is now in Nepal. At about 11.55 a.m. the first defendant arrived near the 90th mile, Kuantan/Kuala Lumpur Road after he had negotiated a bend, and he was then travelling on a straight stretch of road in the direction of Mentakab at about 19 miles per hour. His vehicle was running near the grass verge and the second vehicle in the convoy was about 45 yards ahead of him. As he was proceeding he saw the vehicle in front of him going to the left grass verge. He then observed a civilian lorry coming from the opposite direction at full speed running in the centre of the road and encroaching about four feet to his side. When he saw the truck in front of him swerving to the left and the civilian lorry coming from the opposite direction he gave a hand signal and applied his foot brake. In addition to applying his foot brake he took his vehicle to the left grass verge. While he was doing this he saw the civilian lorry still coming towards him at the same speed. At this he applied his foot brake violently and stopped. Immediately after he stopped his truck the lorry came and hit his truck violently. With the impact he was thrown to the passenger's seat by the side of the driver's seat. After that he could not remember what happened but when he recovered consciousness he found himself in his vehicle facing the other direction, that is, the direction from which he had come. Shortly after that he was taken to the Police Station at Temerloh when a report was taken from him with Lieutenant Hunter acting as Gurkali Interpreter. His evidence in court was almost identical with the report which he had made to the Police almost immediately after the accident.

The evidence of Sergeant Amar Singh Rai is that at about 11.55 a.m. he was leading a military convoy in the direction of Mentakab and that when he was about to negotiate a bend he saw a timber lorry coming from the opposite direction at high speed in the centre of the road. His driver swerved his vehicle to the left side of the road and thus avoided being run into by the timber lorry. He then looked behind and noticed that the driver of the vehicle behind him had also swerved his vehicle to the left side of the road but he could not see what happened to the third vehicle in the convoy because he had just negotiated the bend. However, he heard the sounding of a horn whereupon he ordered his driver to stop, got down from the vehicle and walked four or five steps when the scene of the accident became visible to him. He saw the third vehicle of his convoy facing the direction from which it had come. About this time he saw a car passing by and coming from the direction of Mentakab.

The story of the second defendant is that he was driving his timber lorry BF6380 in the direction of Bentong shortly before the collision and that he was travelling at about 20 miles per hour. He passed two military vehicles in the convoy and then saw a third military vehicle. When he first saw the military truck at a distance of about 50 yards from him it was moving to the middle of the road. It then moved back to its side but when it was about 15 feet from him, it came to the middle of the road again and collided with the lorry. The military truck struck the front part of the right side of his lorry, and when his lorry was hit it went off the road into a drain and then turned over. His contention is that he was all the time on his correct side of the road and that he was driving only at a speed of 20 miles per hour.

Three witnesses gave evidence on behalf of the second defendant to say that they were travelling in motor car BF7723 behind the timber lorry for about two miles and that they saw the accident. The story of Ahmad bin Yakob, one of the passengers in the car, briefly is that when the military truck was about to cross the timber lorry it swerved to the right and collided with the lorry and that at the time of the impact the military truck was in the middle of the road and the timber lorry on the left side of the road.

The witness, however, agreed that the accident came to him as a complete surprise and it happened very suddenly. The evidence of Ng Soon Chye, the driver of motor car BF7723 is that as the military truck and the timber lorry were nearing each other the military vehicle suddenly swerved to the right and knocked into the lorry. He demonstrated how the military truck had hit the lorry on the right side behind the cab. He stated further that with the impact the lorry was tilted on one side and the military truck was climbing on it, and that when the timber lorry capsized the military truck turned round and came alongside the lorry and faced the same direction. The third passenger in the car BF7723, Manickam, was offered for cross-examination. He said he saw the accident, although he gave no evidence as to how the accident happened.

Inspector Thanasegaram, O.C.P.D., Mentakab(P.W.1) gave evidence as to his investigations as a result of which he prepared a plan of the scene of the accident (P.7). The plan indicates the positions of the vehicles after the accident and shows brake marks and wheel marks at the scene of the accident, which in such cases generally give a better picture of the accident than witnesses who claim to have seen the accident.

I propose first to deal with the evidence of the three witnesses for the second defendant because I am satisfied that they did not actually see the accident although, in view of the evidence of Sergeant Amar Singh Rai that he saw a car passing by after he had got down from his Land Rover and seen the scene of the accident, there is a reasonable inference that they appeared on the scene soon after the accident took place. Their evidence as to the actual impact would not appear to be borne out by the evidence of the second defendant himself and it is certainly not consistent with the damage to the two vehicles as shown in the photographs. The evidence of Ahmad bin Yakob is that the military truck struck the front offside part of the lorry whereas the evidence of Ng Soon Chye is that the military truck hit the lorry on the offside behind the cab. The evidence of both the first defendant and the second defendant that the impact was a frontal impact clearly shows that these two witnesses did not actually see the accident. The third witness Manickam was offered for cross-examination and no questions were put to him as to how the impact between the two vehicles took place. All he said was that he saw the accident. Most of his cross-examination was directed to the previous evidence which he had given in the Magistrates' Courts at Temerloh and Bentong as to how the accident had taken place with a view to impeaching his credit. In the circumstances I have come to the conclusion that the evidence of these three witnesses cannot be relied upon with any degree of certainty.

It follows from what I have said above that the evidence on which this case falls to be decided is the evidence of the first defendant and that of the second defendant and his witness, together with the evidence of Inspector Thanasegaram.

Upon a careful and anxious consideration of the evidence in this case I have come to the conclusion that of the two versions as to how the accident happened that of the first defendant and his witness is substantially the true version. The evidence of Sergeant Amar Singh Rai that he saw the timber lorry travelling at a high speed in the centre of the road as it was coming round the bend was never challenged. Both he and the first defendant stated that the second vehicle in the military convoy had to swerve to the left in order to get out of the path of the lorry. I therefore accept the story of the first defendant that the timber lorry was travelling fast and that it was on the wrong side of the road. The marks which Inspector Thanasegaram found near the left side of the road facing Mentakab quite clearly indicate that, in the first place, the defendant was driving on his correct side of the road and, secondly, that he applied the brakes as soon as he saw the timber lorry coming towards him. In any event, there is no evidence to indicate that he was hugging the centre of the road and was failing to give way to the other vehicle. I have no reason to doubt his story that he also gave a hand signal as he stated. His story that in addition to applying his foot brake he took his vehicle to the left of the grass verge is also borne out by tyre marks. I also accept his story that he applied his foot brake violently as he saw the lorry still coming towards him.

The only part of the first defendant's story which has troubled me and caused me some anxious moments is that relating to the point at which he applied his brakes violently. The plan prepared by the Inspector shows a straight tyre mark from point 25 to point 27 which is believed to have been made by the offside wheels of the military truck. According to him the mark became a bit faint at about the point at which the first defendant stated that he applied his brakes violently. A bit further down from that point the nearside tyre mark emerges on the edge of the road. This is shown in the plan as a rather zigzag mark which would seem to indicate that it was made either by the nearside front or rear wheel of the truck as it was turned round as a result of the impact between the two vehicles.

It is common ground that as a result of the impact the military truck was turned right round and was found after the accident to be facing the direction from which it had come. On the other hand some of the photographs show almost parallel marks which would seem to indicate that the actual impact took place further down the point indicated by the first defendant. The sudden gap in the mark made by the offside tyre of the military truck may perhaps be accounted for by the fact that during the split second that the first defendant pressed down the brake there may have been slight relaxation of the locking of the tyre. Whatever view I take of the mark up to point 29, I am satisfied and I find as a fact that there was no encroachment by the military truck at any stage beyond his correct half of the road. This is clear from the plan (P.7) the basis of which was what Inspector Thanasegaram saw at the scene soon after the accident. The photographs, on the other hand, were not taken until the following day. It may well be that on the violent application of the brakes by the first defendant the course of the military truck was deflected slightly to the right, but even so I do not think that that can be regarded as an act of negligence on the part of the first defendant. From the way in which the military truck was turned round I am satisfied that this could have happened only if the military truck had either stopped or was almost stationary and the timber lorry was running fast when the impact took place.

In the face of the dangerous situation created by the timber lorry the defendant took the maximum avoiding action that he could possibly take. His story is that he could not take his vehicle any further to the left as there was a ditch. This is supported by the evidence of Inspector Thanasegaram who said that there was a laterite verge of two feet on the right side of the road facing Lanchang beyond which there was a drain. In the circumstances I am satisfied that the first defendant was not guilty of any negligence and therefore he was not to blame for the accident.

As regards the second defendant, I am satisfied that he came round the bend at a high speed. I need hardly repeat that the evidence as to the speed of the lorry by the first defendant and Sergeant Amar Singh Rai was never challenged. Again I am satisfied that the timber lorry at that high speed negotiated the bend on its wrong side. The evidence of the second defendant is that the bend is about 300 yards from the scene of the accident. On that point I accept the independent evidence of the Inspector who said that the bend is approximately a hundred yards from the scene of the accident. The second defendant was forced to admit under cross-examination that if a vehicle were to come round a bend fast the tendency would be for it to go to the wrong side of the road. I do not accept the second defendant's story that his lorry was almost on the left verge of his correct side of the road. The Inspector found no tyre marks on the laterite verge made by the timber lorry which admittedly was very much heavier than the military truck as it was fully loaded with timber. The second defendant says that he saw the military truck driven in a zigzag manner. Yet there is no evidence that he took any avoiding action. There is no evidence that he took any steps to reduce the speed of his lorry or to swerve it to the left when he first saw the military truck at a distance of about 50 yards. Indeed it would appear from his evidence that the only avoiding action he took was to apply the brakes when the military truck was 15 feet from his lorry. The angle at which his lorry went off the road would seem to indicate that he was not driving his lorry near the left verge. To sum up, I find as a fact that the second defendant drove his lorry at an excessive speed when negotiating the bend as a result of which he went to the wrong side of the road and that he failed to slow down. I also find as a fact that he collided with the military truck which at the time of the collision was well on its correct side of the road and had come to a stop or was almost stationary and that he failed to take any adequate avoiding action. In the circumstances I am driven to the conclusion that the accident was caused solely due to his negligence and that he alone is liable to pay damages.

Coming to the question of damages, the claim for loss of expectation of life (which I assess at $3,000) need not be considered separately as it will merge in the damages to be awarded under section 7 of the Civil Law Ordinance. The deceased was 34 years old on the date of his death. He was then employed as a lorry attendant on a salary of $150 a month. There is evidence that for about two months before he became a lorry driver his monthly income was approximately $220 and that prior to that he earned about $300 a month as a carpenter. There is also evidence that the deceased changed his occupation from time to time. The plaintiff's claim that the deceased gave his wife $150 a month for household expenses and that he spent about $40 for the maintenance of his parents. They estimate the value of the loss of support to the deceased's family including his parents at $160 a month. Although the deceased at the time of his death was earning only $150 a month, I am satisfied that his average monthly income was considerably higher. However, allowing for the food expenses of the deceased

at about $30 a month, I consider $140 a month would be a reasonable estimate of the value of loss of support for the purpose of this case.

The deceased was a healthy man so that the probable duration of his profitable working life would be another twenty years. His widow is about the same age as the deceased. She may remarry although I am inclined to think that the chances of her finding a husband who will also agree to look after her children by the deceased husband are likely to be remote. Taking into consideration the usual factors in this type of case including the normal expectation of an active working life for a man of 34, the hazards and vicissitudes of life, the accelerated payment of compensation in a lump sum and allowing a suitable reduction for the above factors, I would assess general damages under section 7 of the Civil Law Ordinance in the sum of $15,750. I do not think any deduction should be made for the deceased's quarter share in the house in which his family have stayed over the years and are still living. That would appear to be the correct view to take in view of the decision in the case of *Heatley and Another* v. *Steel Co. of Wales Ltd.*[1].

The sum of $15,750 by way of general damages will be apportioned as follows:—

To the widow, Liew Mooi	$6,750
To the first child, Chen Nyit Yeo (daughter)	1,000
To the second child, Chen Nyit Lin (son)	1,500
To the third child, Chen Yuet Choong (son)	2,500
To the fourth child, Chen Nyuet Leow (daughter)	3,000
To the father, Chen Foong	500
To the mother, Lee Thai	500

The shares of the widow and the parents can be paid out to them but the shares of the infant children shall be paid to the Public Trustee to be held by him until they reach the age of majority.

As regards special damages, the plaintiff's claim is for a sum of $1,500 by way of funeral expenses. It is agreed that the third defendant has already paid a sum of $1,000 to the plaintiffs towards funeral expenses and that he does not wish to claim back any part of it. In view of my findings as to his liability to pay damages, I allow $500 by way of special damages in respect of funeral expenses.

There will be judgment for the plaintiffs against the second and third defendants in the sum of $16,250 and judgment in favour of the first defendant. The second and third defendants will pay the costs of the plaintiffs and of the first defendant as taxed on the higher scale.

Judgment for the plaintiffs against 2nd and 3rd defendants.

Solicitors:—*Murphy & Dunbar; Shearn Delamore & Co.; Allen & Gledhill.*

UNITED MARKETING CO. v. HASHAM KARA

[P.C. (Lord Evershed, Lord Hodson and Donovan L.J.) April 8, 1963]

[Privy Council Appeal No. 11 of 1961]

Privy Council—Practice—Fresh point—Fact and Law —When entertained.

The Privy Council will not allow a point not taken in a lower court to be argued unless satisfied that the evidence on which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. Even if the facts are beyond dispute they would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the court below.

Cases referred to:—

(1) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480; 8 T.L.R. 752, P.C.

(2) *Archambault* v. *Archambault* [1902] A.C. 575, P.C.

(3) *Lewis Ltd.* v. *Norwich Union Fire Insurance Co. Ltd.* [1916] S.A.L.R. App. D. 509.

(4) *Sacks* v. *Western Assurance Co.* (1907) 5 Transvaal L.R. (Witwatersrand H.C.) 257.

(5) *North Staffordshire Railway Co.* v. *Edge* [1920] A.C. 254, 263; 36 T.L.R. 115, H.L.

PRIVY COUNCIL APPEAL from the Court of Appeal for Eastern Africa.

In this case the respondent claimed damages from the appellants on the ground that they were under a contractual obligation to renew, his policy of insurance with the Jubilee Insurance Co. covering his stock-in-trade which was substantially lost when the shop of which he was lessee was destroyed by fire in April 1956. Both the trial court and the Court of Appeal for Eastern Africa found in his favour. On appeal to the Privy Council the appellants sought to raise the additional ground of appeal that even if they were wrong as to the agreement, damages could not be more than nominal since the respondent was in breach of a condition of the policy of insurance that he would "keep a complete set of books of account and stock sheets or stock books, showing a true and accurate record of all business transactions and stock in hand, and such books shall be locked in a fire-proof safe, or removed to another building at night, and all times when the premises are not actually open for business."

F. P. Neill for the appellants.

J. G. Le Quesne Q.C. for the respondent.

The judgment of their Lordships was delivered by,